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No. 88-848

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN MINING CONGRESS, ET AL., PETITIONERS

v.

ENVIRONMENTAL DEFENSE FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in reversing the decision of the Environmental Protection Agency (EPA) to withdraw its proposed reinterpretation of the mining waste exclusion in Section 3001(b)(3)(A)(ii) of the Resource Conservation and Recovery Act, 42 U.S.C. 6921(b)(A)(ii).

2. Whether the court of appeals' remedial order directing the EPA to remove six particular hazardous smelter wastes from coverage under the mining waste exclusion impermissibly usurped agency functions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 852 F.2d 1316.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1988. Pet. App. 1a. Upon consideration of petitions for rehearing, the judgment was amended and the petitions were otherwise denied on August 23, 1988. Pet. App. 32a-33a. The petition for a writ of certiorari was filed on November 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 9, 1986, the United States Environmental Protection Agency (EPA) withdrew its proposed reinterpretation of the scope of the mining waste exclusion con-

tained in Section 3001(b)(3)(A)(ii) of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6921(b)(3)(A)(ii). See 51 Fed. Reg. 36,233; Pet. App. 70a-73a.[1] EPA's withdrawal of the proposed reinterpretation of the mining waste exclusion left certain hazardous smelter wastes exempt from regulation as hazardous wastes under RCRA. The court of appeals reversed EPA's decision for that reason and because it concluded that the agency action reaffirmed an overbroad interpretation of the scope of the mining waste exclusion. Pet. App. 26a-29a.

1. In 1976, Congress enacted Subtitle C of RCRA, 42 U.S.C. 6921-6931 (1982 & Supp. IV 1986). Congress's aim was to create a comprehensive "cradle to grave" regulatory program to protect human health and the environment from the risks associated with the improper handling, storage, and disposal of hazardous waste. See H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976). To that end, Section 3001 of RCRA, 42 U.S.C. 6921 (1982 & Supp. IV 1986), directs EPA to identify and list those solid wastes which are hazardous and which therefore are subject to regulation under Subtitle C.[2]

On December 18, 1978, EPA proposed comprehensive regulations for the treatment, storage, and disposal of

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[1] RCRA was enacted on October 21, 1976 (Pub. L. No. 94-580, 90 Stat. 2795) and amended in 1980 (Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334) and again in 1984 (Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221).

[2] A solid waste may be a hazardous waste under Section 3001 either because it has the characteristics of hazardous wastes or because it has been specifically listed as such by EPA after a rulemaking proceeding. See 40 C.F.R. Pt. 261.

hazardous wastes under Subtitle C of RCRA. 43 Fed. Reg. 58,957-58,959. The proposed regulations identified a class of "special wastes" that were generated in large volumes, were thought to pose less of a hazard than other hazardous wastes, and were thought not to be amenable to the control techniques proposed for hazardous waste treatment, storage, and disposal facilities. *Id.* at 58,992; Pet. App. 46a-47a. EPA accordingly proposed that less stringent regulatory requirements would apply to special wastes than to other hazardous wastes. *Ibid.* EPA identified waste materials from the extraction, beneficiation, and processing of ores and minerals (mining waste), as being special wastes. 43 Fed. Reg. 59,016; Pet. App. 48a.

On May 19, 1980, EPA promulgated final hazardous waste management regulations under Subtitle C. 45 Fed. Reg. 33,066; see Pet. App. 49a-52a. The final regulations did not recognize a "special waste" category. Consequently, hazardous mining waste was to be subject to the same requirements as other hazardous wastes. 45 Fed. Reg. 33,084. Along with its final rule, EPA listed as hazardous various waste streams generated from primary metal smelters, including six that are specifically at issue now—copper blowdown wastes, lead impoundment solids, zinc wastewater sludges, aluminum potliners, emission control dust or sludge from the production of ferrochromium, and such dust or sludge from the production of ferrochromium-silicon. *Id.* at 33,124; *id.* at 47,832, 47,834 (July 16, 1980); Pet. App. 50a, 53a-54a. See Pet. App. 5a.

On October 21, 1980, one month prior to the effective date of EPA's Subtitle C regulations (see 45 Fed. Reg. 33,066 (1980)), Congress enacted the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334, which included what is known as the Bevill Amendment. The Amendment added Section 8002(p), 42 U.S.C.

6982(p), which required EPA to complete and to submit to Congress a detailed study on "solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore"—hereafter referred to as mining waste. That study was to be conducted in conjunction with a related study required by Section 8002(f), 42 U.S.C. 6982(f), and both were to be completed by October 1983. The Bevill Amendment also added Section 3001(b)(3)(C) to RCRA, 42 U.S.C. 6921(b)(3)(C), which required EPA, within six months after completing its mining waste studies, either to promulgate Subtitle C regulations or to determine that such regulations are unwarranted. Finally, the Bevill Amendment added Section 3001(b)(3)(A)(ii) to RCRA, 42 U.S.C. 6921(b)(3)(A)(ii), which prohibited EPA from regulating such mining wastes and certain other specified wastes under Subtitle C until EPA completed its studies under Section 8002(f) and (p) and also promulgated regulations or decided not to regulate pursuant to Section 3001(b)(3)(C). See Pet. App. 6a-7a.

On November 19, 1980, in response to the new legislation, EPA amended its hazardous waste regulations to incorporate, essentially verbatim, the mining waste exclusion set forth in the Bevill Amendment. 45 Fed. Reg. 76,618; Pet. App. 55a. In the preamble to the amended regulation, EPA stated that, as a "temporary accommodation" to the mining industry, it would interpret the exclusion to cover "solid waste from the exploration, mining, milling, smelting, and refining of ores and minerals" (45 Fed. Reg. 76,619)—that is, to cover processing wastes from the smelting and refining of ores and minerals (*id.* at 76,618). In accord with that interpretation (the 1980 interpretation), EPA also amended its regulations to suspend the previous listing of the six waste streams associated with

metal smelting (three "temporarily"). 46 Fed. Reg. 4614-4615 (1981); *id.* at 27,473; Pet. App. 56a-59a. See Pet. App. 8a.

2. In 1984, respondent Environmental Defense Fund (EDF) and others brought suit challenging EPA's failure to complete the required mining waste studies or to make the required determination regarding the issuance of regulations for such waste. By that time, the statutory deadlines for such action had passed. The plaintiffs also contended that, for certain hazardous smelter wastes, EPA was required *either* to determine that they are outside the scope of the Bevill Amendment's exclusion and hence relist them *or* to include them within the mining waste study. The district court, in agreement with the plaintiffs, ordered EPA to complete the mining waste studies and report to Congress by December 31, 1985, and to make the regulatory determination no later than six months thereafter. In addition, pursuant to EPA's own statement that it intended to reinterpret the mining waste exclusion so that it would not cover certain processing smelter wastes, the district court ordered EPA either to propose such a reinterpretation or to study and report on such wastes by specific dates. *Concerned Citizens of Adamstown* v. *EPA*, Civ. No. 84-3041 (D.D.C. Aug. 21, 1985). See Pet. App. 9a-10a.

EPA met the court-ordered schedules for completing the Section 8002(f) and (p) studies and the report to Congress and for making the regulatory determination required by Section 3001(b)(3)(C). Thus, EPA submitted its "Report to Congress on Wastes from the Extraction and Beneficiation of Metallic Ores, Phosphate Rock, Asbestos, Overburden from Uranium Mining, and Oil Shale" on December 31, 1985, and six months later it published its determination that regulation under Subtitle C of the mining wastes covered by the report was not war-

ranted at that time. 51 Fed. Reg. 24,496 (1986). The report to Congress and the regulatory determination covered extraction and beneficiation of mining wastes; they did not cover processing wastes.[3] See Pet. App. 12a-13a.

EPA addressed such wastes in the promised proceeding regarding reinterpretation of the Bevill Amendment's mining waste exclusion. In late 1985, EPA proposed a reinterpretation (the 1985 reinterpretation) that would narrow the scope of the Bevill Amendment exclusion as it applied to processing wastes. 50 Fed. Reg. 40,292; Pet. App. 60a-69a. Upon reviewing the legislative history of the Bevill Amendment, EPA concluded that the broad 1980 interpretation was incorrect because Congress did not intend the mining waste exclusion to apply to all wastes from smelting and refining, explaining that such a reading of the term "processing" in the statutory exclusion had the effect of removing from Subtitle C regulation many obviously hazardous wastes that are "generated many steps beyond the initial extraction and beneficiation of ores and minerals." 50 Fed. Reg. 40,293; Pet. App. 10a-11a Rather, EPA concluded, Congress intended "processing" wastes to cover only the types of high volume, low hazard wastes that EPA had deemed "special wastes" in its 1978 proposed regulations. *Ibid.* EPA identified only four such wastes as covered under the new interpretation,[4] but it solicited public comment on what additional processing wastes, if any, should be included in the mining waste ex-

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[3] EDF challenged EPA's regulatory determination for extraction and beneficiation mining wastes in the companion case below, *Environmental Defense Fund* v. *EPA*, 852 F.2d 1309 (D.C. Cir. 1988). The court of appeals upheld EPA's decision not to regulate extraction and beneficiation wastes under Subtitle C of RCRA. *Id.* at 1313-1316.

[4] The wastes were bauxite refining muds, phosphogypsum from phosphoric acid plants, slag from phosphorus reduction, and slag from primary metal smelters. 50 Fed. Reg. 40,301 (1985).

clusion under the "special waste" criteria. 50 Fed. Reg. 40,294-40,295, 40,301. The six smelter wastes that had been removed from the listing regulations after the enactment of the Bevill Amendment, by contrast, were produced in much lower volumes, and EPA had already determined in 1980 that they posed a substantial hazard. Accordingly, EPA proposed to relist those wastes as hazardous wastes subject to Subtitle C regulation. *Id.* at 40,295; Pet. App. 66a-69a. See Pet. App. 11a-12a.

Pursuant to the district court's order in the *Adamstown* case, EPA was required to take final action on the 1985 reinterpretation by September 1986. At the end of that month, EPA did so by withdrawing the 1985 reinterpretation (the 1986 withdrawal), thereby reinstating the broad 1980 interpretation. 51 Fed. Reg. 36,233; Pet. App. 70a-73a. EPA explained that there were substantial difficulties in developing practical (quantified) criteria for applying its high volume, low hazard standard for distinguishing processing wastes from non-processing wastes; and because of those difficulties, EPA said, it was unable to determine whether the Bevill Amendment properly applied to various wastes other than the four that were found within the Amendment in 1985. As for the six smelting and refining wastes that EPA had proposed to relist as hazardous in 1985, EPA also withdrew the proposal for relisting; as a result, they were neither listed as hazardous nor included within the mining waste study, report to Congress, or regulatory determination. See Pet. App. 14a-15a.

3. On petitions for review filed by respondents EDF and Hazardous Waste Treatment Council (HWTC), the court of appeals held that the 1986 withdrawal of the 1985 reinterpretation in its entirety, including the proposed listing of the six smelting and refining wastes, was

unlawful. Pet. App. 1a-31a. Analyzing the language, structure, and legislative history of the mining waste exclusion, the court concluded, as the EPA had in 1985, that the Bevill Amendment was intended to apply only to those smelting and refining wastes that were high volume, low hazard "special wastes" under EPA's 1978 standard. *Id.* at 21a-26a. The court further concluded that the definitional problems encountered by EPA, combined with the district court deadline for taking final action, did not justify "withdrawing the proposal to relist the six hazardous smelting wastes which clearly would not qualify under any acceptable definition, however precise, of 'special wastes.' " *Id.* at 27a. "Those six wastes are not properly within the scope of the Bevill exclusion regardless of the status of any additional wastes." *Id.* at 27a-28a. Moreover, the court ruled, it was arbitrary and capricious for EPA to withdraw the 1985 reinterpretation in its entirety, leaving the concededly overbroad 1980 interpretation in effect, without first asking the district court for additional time to work out the unanticipated difficulties in refining the high volume, low hazard standard. *Id.* at 28a.

Turning to the question of the appropriate relief, the court of appeals set a date for EPA to remove the six smelter wastes from coverage under the mining waste exclusion and to relist them as hazardous wastes.[5] The court also set a schedule for EPA to follow in determining what processing wastes remain within the Bevill Amendment exclusion. The court added to the schedule various deadlines for completion of the Section 8002 study for all processing wastes remaining within the Bevill exclusion and for the

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[5] With respect to relisting, we understand the court to have ordered only that EPA, once having removed the six wastes from the Bevill exclusion, must make a final determination whether to relist them as hazardous wastes. 53 Fed. Reg. 35, 413 n.3 (Sept. 13, 1988).

required Section 3001(b)(3)(C) regulatory determination. Pet. App. 30a-31a. The court later extended the deadlines. *Id.* at 32a-33a.

4. In compliance with the court of appeals' order, EPA issued a final rule declaring outside the scope of the mining waste exclusion the six smelter wastes originally listed in 1980. 53 Fed. Reg. 35,412 (Sept. 13, 1988); Pet. App. 74a-76a. EPA also relisted the wastes, explaining that the relisting decision was based on an evaluation of the hazardous waste listing criteria as applied to those wastes. 53 Fed. Reg. 35,413 n.3, 35,417, 35,419 (Sept. 13, 1988). EPA subsequently published a notice of proposed rulemaking on the scope of the Bevill Amendment exclusion for all remaining processing wastes (the 1988 proposal). 53 Fed. Reg. 41,288 (Oct. 20, 1988); Pet. App. 77a-96a. EPA has since that time accepted written comments and conducted a public hearing on the 1988 proposal. The court of appeals' order requires EPA to take final action on the 1988 proposal by February 15, 1989.

ARGUMENT

1. Petitioners first contend (Pet. 10-16) that the court of appeals erred in concluding that the Bevill Amendment's mining waste exclusion for "processing" wastes, as it applies to smelting and refining wastes, includes only high volume, low hazard wastes. They argue that the Bevill Amendment exclusion unambiguously applies to all wastes generated in smelting and refining. That argument is incorrect. Because, in addition, the court of appeals' ruling does not conflict with any other judicial decision or present an issue of extraordinary importance, further review of the court's ruling is not warranted.

In the court of appeals, EPA argued that its 1986 withdrawal was valid, under *Chevron U.S.A. Inc.* v. *Natural*

Resources Defense Council, Inc., 467 U.S. 837, 842-844 (1984), as a reasonable interpretation of a statutory provision on an issue as to which Congress did not have a clear intent. The court of appeals, following the *Chevron* approach, found the evidence of congressional intent more conclusive than EPA suggested. The court held that Congress did have a clear intent on the issue—that it intended only high volume, low hazard smelting and refining wastes to be covered by the "processing" exclusion. EPA has decided not to challenge that ruling, but to accept the court's construction of the Bevill Amendment.

Petitioners have not raised in this Court the question whether the court of appeals erred in rejecting EPA's *Chevron* argument. Rather, petitioners' sole statutory argument is that Congress clearly intended that all smelting and refining wastes were to be covered by the Bevill Amendment exclusion. But the court of appeals' analysis of the language, structure, and legislative history of the Amendment, which we will not repeat here, persuasively shows that petitioners' view is incorrect. Indeed, EPA has never construed the exclusion as unambiguously covering all smelting and refining wastes—no matter how hazardous they are, no matter how far removed from extraction and beneficiation are the smelting and refining in which they are generated, no matter how unrelated to the 1978 "special waste" concept they are. To the contrary, EPA expressed doubt about such a broad position even in 1980, immediately after the Amendment was enacted (Pet. App. 7a-8a); EPA expressly concluded in its 1985 reinterpretation that the better reading of the statute was the narrower one that the court of appeals adopted in this case (50 Fed. Reg. 40,293); and as the court of appeals noted (Pet. App. 26a), EPA did not repudiate that conclusion even when it withdrew the reinterpretation in 1986.

2. Petitioners also argue (Pet. 16-23) that the court of appeals erred when it determined on its own that the six smelter wastes were outside the Bevill Amendment exclusion without awaiting EPA's prescription of the criteria for applying the exclusion. They contend that the court of appeals thereby violated ripeness and primary jurisdiction doctrines. Review of this contention is not warranted.

First, EPA has decided to accept the court of appeals' order and the conclusion on which it rests. Thus, EPA has removed the six wastes from the Bevill exclusion and determined to relist them (53 Fed. Reg. 35,412 (Sept. 13, 1988)), and it has proposed high volume, low hazard criteria that plainly do not apply to the six wastes (*id.* at 41,296). Moreover, as we read the court of appeals' order, petitioners have not been precluded from arguing that the six wastes do not meet the criteria for listing as hazardous wastes in challenging EPA's recent decision to relist them (although they cannot there argue that the wastes are within the Bevill Amendment exclusion, as the court in this case decided that issue).[6]

In any event, the court of appeals' decision does not repudiate any principles of "ripeness" or "primary jurisdiction." In fact, the court's conclusion regarding the six smelter wastes was a natural consequence of its reading of the statutory mining waste exclusion. The court construed the statute to encapsulate EPA's 1978 "special waste" concept. Pet. App. 26a. That concept was not given precise definition, but the six wastes now at issue were not encompassed by it. See 43 Fed. Reg. 58,991-58,992 (1978); Pet. App. 46a-47a (listing special wastes). Moreover, as the

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[6] Two of the petitioners in this case have filed petitions for review of EPA's final rule listing the six hazardous smelter wastes. *American Mining Congress* v. *EPA*, No. 88-1835 (D.C. Cir.); *The Aluminum Ass'n* v. *EPA*, No. 88-1837 (D.C. Cir.).

court of appeals pointed out based on EPA's own figures (Pet. App. 11a), the six smelter wastes are generated in much lower volume than the identified special wastes. The court of appeals accordingly concluded, based on its reading of congressional intent, that the mining waste exclusion, whatever its precise contours, could not cover the six wastes at issue.

In short, in the court of appeals' view, any definition of "high volume, low hazard" that did cover the six smelter wastes would not be consistent with the statute. It follows that there was no need for any additional factual determination by EPA concerning whether the six wastes meet the new Bevill criteria that EPA promulgates. See Pet. App. 27a-28a. Given the court's statutory construction, its determination that the six wastes are outside the mining waste exclusion does not present any ripeness or primary jurisdiction problem. Because, as we have argued, the court's construction of the statute does not merit review, neither does petitioners' challenge to the court's determination regarding the six smelter wastes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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